Supreme Court, U.S.
FILED

No. 92-1488

In the
Supreme Court of the United States
October Term, 1992

ROGER A. PETERSON,
Petitioner,

v.

R.H. STAFFORD,
the Washington County Auditor,
Respondent,

and

JOAN ANDERSON GROWE,
the Secretary of State of the
State of Minnesota,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

REPLY BRIEF TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Table of Contents..... i

Table of Authorities..... ii

I. Reasons For Granting The Writ..... 1

II. The Petitioner Has Properly Raised The First and Fourteenth Amendment Issues..... 4

III. The Anderson Balancing Test Must Be Applied In The Analysis Of This Challenge To The Judicial Election Statute..... 6

IV. Application Of The Anderson Test Renders Minn. Stat. §204B.36, Subds. 4 and 5, Unconstitutional..... 10

V. Conclusion..... 20

TABLE OF AUTHORITIES

STATUTES:

Minnesota Statute §204B.36.....9, 10, 15-17

Minnesota Statute §204B.44 12

CASES:

Anderson v. Celebrezze,
103 S.Ct. 1564 (1983)..... .2, 6-8, 10, 12, 14, 15, 17

Clough v. Guzzi,
416 F.Supp. 1057 (D.Mass 1976) . . 19

Dart v. Brown,
717 F.2d 1491 (1983) 3

Gustafson v. Holm,
232 Minn. 68, (1950) 19

McLain v. Meier,
637 F.2d 1159 (8th Cir. 1980) . . 3, 4

Peterson v. Stafford,
490 N.W.2d 418 (Minn. 1992) . . . 1, 6

Rosen v. Brown,
970 F.2d 169 (6th Cir. 1992)...2, 8, 13, 15

Ulland v. Growe,
262 N.W.2d 412 (Minn. 1978) . . 17, 19

Williams v. Rhodes,
89 S.Ct. 5, 12 (1968) 15

Williamson v. Fortson,
376 F.Supp. 1300 (N.D. Ga 1974) . . 19

The Petitioner, Roger A. Peterson, respectfully submits this Reply Brief and requests that the Court grant his Petition for a Writ of Certiorari.

I.
REASONS FOR GRANTING THE WRIT

The Minnesota Supreme Court's decision in Peterson v. Stafford, 490 N.W.2d 418 (Minn. 1992), raised important federal questions: Whether a state statute that provides election ballot voting cues which benefit incumbent judicial candidates and thereby denies to challengers and voters their First Amendment rights of free speech and free association and denies them equal protection of the laws guaranteed by the Fourteenth Amendment, is unconstitutional. Or, viewed from a different perspective, whether a state legislature can in-

directly amend an article of the State Constitution which established federally protected rights of free speech, free association and the freedom to vote under the First and Fourteenth Amendments by passing special laws without submitting the question to a vote of the people. That court's decision conflicts with the decisions of other state courts of last resort and with decisions of some United States Courts of Appeal. Specifically, the Sixth Circuit, applying the Anderson balancing test, recently struck down as unconstitutional a similar provision regulating party designations on ballots. Rosen v. Brown, 970 F.2d 169 (6th Cir. 1992). The Fifth Circuit upheld a state statute restricting notation on the ballot of a candidate's party affiliation with an

"unrecognized" political party. Dart v. Brown, 717 F.2d 1491 (1983). And the Eighth Circuit struck down a North Dakota incumbent-first statute. McLain v. Meier, 637 F.2d 1159 (8th Cir. 1980).

That there are significant differences of opinion among state and federal courts is clearly demonstrated by the numerous cases cited by Petitioner in his Petition at 24-25 nn. 5 and 6 and the cases cited by the State in its Brief in Opposition at 10-11. The Courts have not spoken with one voice regarding the constitutionality of providing advantages to one class of candidates for a position which burden the rights of other classes of candidates for the same position.

This court should grant the Petition in order to resolve the conflict among

the courts. The Minnesota Supreme Court has decided "an important question of federal law which has not been, but should be, settled by this Court...." Sup. Ct. R. 10.1(c).

II.

THE PETITIONER HAS PROPERLY RAISED THE FIRST AND FOURTEENTH AMENDMENT ISSUES

The challenged statutory provisions do not deny a candidate access to the ballot. However, the provisions miscast and manipulate the information provided on the ballot and the form in which the information is presented to the voters. This state manipulation directly influences the electorate's fundamental right to vote, McLain v. Meier, 637 F.2d 1159, 1167 (8th Cir. 1980), by suggesting that the voter should vote for the incumbent. Inclusion of the "incumbent" designation and the designation of the

seat as the "incumbent's seat" on the ballot infringes upon every candidate's right, guaranteed by the Equal Protection Clause of the Fourteenth Amendment to a free and fair election, in which all candidates are treated equally.

Mr. Peterson has emphasized in his Petition that the statutory provisions deny him and all those similarly situated, in addition to voters who support non-incumbent judicial candidates, equal protection of the laws. These rights are, of necessity, closely intertwined with the voters' and candidates' First Amendment rights of free speech and free association. Mr. Peterson's Petition thoroughly discusses these connected rights and this Court's decisions which have addressed these issues.

III.

THE ANDERSON BALANCING TEST MUST BE APPLIED IN THE ANALYSIS OF THIS CHALLENGE TO THE JUDICIAL ELECTION STATUTE.

In its analysis of Mr. Peterson's challenge to the judicial election statute, the Minnesota Supreme Court applied "something akin to the rational basis test." Peterson v. Stafford, 490 N.W.2d at 423. The proper test to apply, however, was enunciated by this Court in Anderson v. Celebrezze, 103 S.Ct. 1564 (1983). This Court stated that:

> [c]onstitutional challenges to specific provisions of a State's election laws...cannot be resolved by any "litmus-paper test" that will separate valid from invalid restrictions. (Citation omitted)...It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must

> not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Id. at 1570 (citations omitted).

This Court specifically stated that where a state election law is challenged as unconstitutional, the applicable standard is the balancing test set forth in Anderson v. Celebrezze. Id. This Court based its conclusions in Anderson directly on the First and Fourteenth Amendments and did not engage in a separate Equal Protection Clause analysis. The Court, however, relied upon the analysis in its previous election cases resting on the Equal Protection Clause of the Fourteenth Amendment. Id. at 1569 n.7.

Minnesota would restrict application of the Anderson balancing test to iden-

tical factual scenarios. However, this Court has emphasized that a court reviewing an election rights case must consider the asserted injury to the "rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate." Id. at 1570. This view was recently adopted by the Sixth Circuit in Rosen v. Brown, 970 F.2d 169 (6th Cir. 1992), a case factually similar to the case at bar.

Rosen v. Brown, 970 F.2d 169 (6th Cir. 1992) arose from a challenge to an Ohio state law prohibiting the placement of the designation "Independent" below the name of a candidate on the general election ballot. The Sixth Circuit court applied the Anderson balancing test to the plaintiff's claims that the statute burdened the fundamental rights of free

speech and free association and denied him the equal protection of the law guaranteed by the Fourteenth Amendment. Id at 174. The court applied the test despite the fact that it was "not the usual ballot access case [in that the challenged statute] did not prevent [the plaintiff] from having his name on the general election ballot." Id. at 175. Nevertheless, the court found that as in the current matter, access to the ballot was effectively nullified and the rights of the plaintiff's supporters to "meaningfully vote and meaningfully associate" were denied by the state statute that provided the "voting cue". Id at 176. Minnesota Statute §204B.36, subds. 4 and 5, has a similar effect and should be struck down by this Court as unconstitutional.

IV.
APPLICATION OF THE ANDERSON TEST RENDERS MINN.STAT. §204B.36, SUBDS. 4 AND 5, UNCONSTITUTIONAL

The first step in the Anderson analysis is to consider the character and magnitude of the alleged injury to the Plaintiff's First and Fourteenth Amendment rights. Id. at 175. As Mr. Peterson stated in his Petition, he has brought his case both as a candidate and as a voter (Petition at 6). While this is not a typical ballot access case, the State has effectively nullified Mr. Peterson's access to the ballot by providing voting cues to the electorate at the moment they are about to cast their vote. "[A]ny restriction on ballot access by candidates necessarily burdens the rights of their supporters to some extent". Id at 176 (citation omitted)

(emphasis added).

The First Amendment protects the right to cast a meaningful vote and to associate meaningfully for the advancement of political beliefs. Id. at 176. Mr. Peterson has alleged that the ballot format and voting cues mandated by the state statutory provisions violate the Equal Protection Clause because they place unequal burdens on non-incumbent judicial candidates, provide a decided advantage for incumbent justices, and dilute the weight of the votes of all the electors who cast their votes for non-incumbents (Petition at 20).

No evidence or testimony was presented in this case because the statute under which Mr. Peterson brought his claims provides that the initial hearing be brought before the Minnesota Supreme

Court. Minn. Stat. §204B.44 (1992). The procedure is conducted in an expedited manner and, therefore, is not conducive to the presentation of testimony and evidence. Mr. Peterson did, however, cite in his brief to the Minnesota Supreme Court and in his Petition to this Court, numerous cases and studies which have recognized that ballot position and voting cues do, in fact, effect the outcome of elections. (Petition at 24 and 25, nn. 5 and 6). These cases and studies support Mr. Peterson's contention that the statute creates a burden that falls unequally on non-incumbent candidates and their supporters. This Court has found such a burden significantly impairs important constitutional rights. Anderson v. Celebrezze, 102 S.Ct. at 1572-1573.

In the next step this Court must determine the legitimacy and strength of the interests advanced by the State to justify the burden imposed by the statute. Rosen v. Brown, 970 F.2d at 176. The State has proposed two justifications for the statutes at issue: (a) the incumbency designation provides information to the voters regarding the qualifications of the incumbents (Brief in Opposition at 15); and (b) the identification of the seat by the name of the currently sitting justice provides information to the voters regarding which seat they are voting upon (Brief in Opposition at 22).

The candidate qualification information provided by the State relates only to incumbent candidates. Moreover, non-incumbent candidates are not permitted

to list any qualifications on the ballot (i.e. lawyer for 32 years or appellate court judge). "A State's claim that it is enhancing the ability of the citizens to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." Anderson v. Celebrezze, 103 S.Ct. at 1575.

In the case at bar, the designation of the seat as the incumbent's and the placement of that designation in the position heading above the names of all the candidates results in the incumbent's name appearing twice on the ballot. This creates a heavy burden on the rights of non-incumbent candidates and their supporters. The present legislation clearly does not provide a reasonable manner in which to achieve the State's interest in avoiding voter con-

fusion. Because the State provides a "voting cue" or "clue" to incumbent judicial candidates but excludes such "voting cues" to non-incumbent challengers, "[t]he resulting burden on voting and First Amendment associational rights [is] 'an invidious discrimination, in violation of the Equal Protection Clause'". Rosen v. Brown, 970 F.2d at 177, quoting Williams v. Rhodes, 89 S.Ct. 5, 12 (1968). This Court must determine that Minn. Stat. 204B.36, subds. 4 and 5 constitutes "invidious discrimination" and is, therefore, unconstitutional.

The final step in the Anderson balancing test is to "weigh all the factors and decide whether the challenged provision is unconstitutional". Id. at 177. Minn. Stat. §204B.36, subds. 4 and

5, burdens the First Amendment rights of free speech and free association and also burdens the right of voters to cast their votes effectively. Furthermore, the statute violates the Equal Protection Clause of the Fourteenth Amendment by placing "unequal burdens" on non-incumbent judicial candidates, and by giving incumbent candidates a decided advantage at the polls. Id. at 177-178. The reasons cited by the State for the incumbency designation and the designation of the position as the incumbent's seat do not justify the burden imposed on non-incumbent candidates. Therefore, this Court must find that Minn. Stat. §204B.36, subds. 4 and 5, are unconstitutional.

The State relies on four cases to support its contention that Minn. Stat.

§204B.36, subds. 4 and 5, are not unconstitutional. None of the courts in these cases applied the Anderson balancing test.[1]

In Ulland v. Growe, 262 N.W.2d 412 (Minn. 1978), the plaintiffs challenged on equal protection grounds the constitutionality of a Minnesota statute that required the names of party-designated candidates to precede the names of independent candidates on election ballots for partisan positions. The facts of Ulland are clearly not analogous to the

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[1]This Court announced the balancing test in 1983. All of the cases cited by the State were decided prior to that date. Ulland v. Growe, 262 N.W.2d 412 (Minn.), cert. denied sub nom Berg v. Growe, 436 U.S. 927 (1978), Clough v. Guzzi, 416 F.Supp. 1057 (D. Mass. 1976); Williamson v. Fortson, 376 F.Supp. 1300 (N.D. Ga. 1974); Gustafson v. Holm, 232 Minn. 68, 44 N.W.2d 443 (1950).

present facts. Evidence received by the trial court and accepted as true by the Supreme Court emphasized two significant points:

> (3) Because of the importance of party affiliation, the effect of positional bias is considerably more pronounced in non-partisan elections.
>
> (4) The magnitude of positional bias tends to vary in inverse proportion to the visibility of a particular election. The less important (for whatever reason) the election, the greater the effect of positional bias.

Id. at 415. The court stressed in numerous places in its opinion, that its analysis of the facts was influenced by the fact that the statute concerned regulation of partisan elections, and did not apply to non-partisan elections. Id. at 414 n.5, 416, 417, 418.

This Court is faced with statutorily provided voting cues for incumbent justices in low-visibility, non-partisan

elections. Under the Minnesota Supreme Court's reasoning in Ulland, the court would have viewed the greater effect of positional bias in non-partisan, low-visibility elections as burdening the rights of the candidates and voters to such a degree that the statute would have been rendered unconstitutional.

The court in Ulland based its decision on the decision in Clough v. Guzzi, 416 F.Supp. 1057 (D.Mass 1976). Id. at 417. The court in Clough v. Guzzi, as well as the courts in the earlier decisions of Williamson v. Fortson, 376 F.Supp. 1300 (N.D. Ga 1974) and Gustafson v. Holm, 232 Minn. 68, 44 N.W.2d 443 (1950), were concerned with voting cues provided in partisan elections. Since the facts in the previously cited cases are not analogous to the instant facts, and the

effect of voting cues in non-partisan elections are more pronounced, thereby creating a more significant burden on the rights of candidates and voters, the cases do not provide guidance in the analysis of the current facts.

V.
CONCLUSION

For the foregoing reasons, the Petition should be granted.

Dated: April 13, 1993

Respectfully submitted,

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